Supreme Court, U.S.
FILED
FEB 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2039

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF HORTON JOHNSON, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. a. Respondent posits a great fork in the road of judicial application of the *Feres* doctrine, and argues that the better and more recent authority demands a determination in every case whether "pursuit of the litigation would involve the judiciary in sensitive military affairs at the expense of military discipline" (Br. 14). In so asserting, respondent misconstrues nearly all of the authority on which she relies. In fact, it continues to be quite clear that the *Feres* doctrine bars liability "under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" (*Feres* v. *United States,* 340 U.S. 135, 146 (1950)), and that no probing factual analysis is required where, as here, that test is plainly met.

Determination of the availability of FTCA relief based on whether an injury occurred incident to service was recognized in *Brooks* v. *United States,* 337 U.S. 49 (1949),

even before *Feres* was decided.[1] and has been the governing rule since. There is no substantial body of authority suggesting that this approach has outlived its usefulness.[2] Even in most of the appellate court decisions cited by respondent (Br. 17-18) as exemplars of a supposed case-by-case approach to *Feres,* the court framed the issue as whether the injury occured incident to service.[3] So, too, in

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[1] The question in *Brooks,* as the Court stated it at the outset, was "whether members of the United States armed forces can recover under [the Federal Tort Claims Act] for injuries not incident to their service" (337 U.S. at 50).

[2] In finding *Feres* inapplicable to a lawsuit for injuries resulting from negligent medical care of a military veteran, the Court in *United States* v. *Brown,* 348 U.S. 110, 113 (1954), reaffirmed "the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty," and concluded that "[s]ince the negligent act giving rise to the injury in the present case was not incident to the military service, the *Brooks* case governs * * *."

In *United States* v. *Muniz,* 374 U.S. 150, 159 (1963), while declining to extend *Feres* to bar an action by a federal prisoner for injuries resulting from the negligence of a government employee, the Court reiterated its holding that "a soldier could not sue under the Federal Tort Claims Act for injuries which 'arise out of or are in the course of activity incident to service.' " The Court there found "no occasion to question *Feres,* so far as military claims are concerned" (*ibid.*).

[3] See *Cole* v. *United States,* 755 F.2d 873, 875, 877 (11th Cir. 1985); *Roush* v. *United States,* 752 F.2d 1460, 1463 (9th Cir. 1985); *Brown* v. *United States,* 739 F.2d 362, 363 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985); *Johnson* v. *United States,* 704 F.2d 1431, 1436 (9th Cir. 1983); *Parker* v. *United States,* 611 F.2d 1007, 1010, 1011, 1015 (5th Cir. 1980); *Cooper* v. *Perkiomen Airways, Ltd.,* 609 F.Supp. 969, 971 (E.D. Pa. 1985).

A number of appellate courts have addressed the applicability of *Feres* to actions concerning injuries to servicemen brought pursuant to the Swine Flu Act, 42 U.S.C. (1976 ed.) 247b(j)(1), which substituted liability of the United States under the FTCA for the otherwise applicable liability of private concerns involved in the swine flu inoculation program. *Brown* v. *United States,* 715 F.2d 463 (9th Cir. 1983); *Hunt* v. *United States,* 636 F.2d 580 (D.C. Cir. 1980). These cases

United States v. *Shearer*, 473 U.S. 52, 57 (1985), the Court reiterated with apparent approval *Feres*' enunciation of the incident to service test.

Of course, at the margin—where it is not obvious that a given event occurred incident to service—courts have indeed resorted to a complex analysis of a number of factors, including the way in which military discipline and decisionmaking are likely to be affected if litigation is allowed. Thus, in *Shearer*, the Court gave great attention to the effects on military "management" of a lawsuit alleging Army negligence in connection with the off-duty, off-base murder of one soldier by another (473 U.S. at 57-59). And in many of the cases cited by respondent from the courts of appeals—typically involving conduct occurring off-duty and sometime off-base—similarly complex analyses have been determinative. See cases cited note 3, *supra*.

However, such an approach to activities tied less explicitly to the injured party's military service has no implications for cases, like the present one, of injuries plainly

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have found *Feres* inapplicable based on the unique nature of the Swine Flu Act and the fact that private rather than government action was being called into question.

We are aware of only three cases, including the present one, where courts have suggested that *Feres* may be inapplicable to actions alleging government wrongdoing, even where an injury occurs incident to service. In *Stanley* v. *United States*, 786 F.2d 1490, 1498 (11th Cir. 1986), the court required a second level of inquiry into the effects on military discipline as a prerequisite to application of *Feres*, even where the injury occurs incident to service. This Court has granted certiorari (No. 86-393 (Dec. 8, 1986)). In *Atkinson* v. *United States*, 804 F.2d 561, 563 (9th Cir. 1986), the court found *Feres* inapplicable to a medical malpractice claim by a servicewoman, reasoning that the doctrine applies only where litigation would require a court to second-guess military decisions or where plaintiff's admitted activities directly implicate the need to safeguard military discipline. The United States presently has pending a petition for rehearing en banc in the court of appeals.

suffered in the course of a military mission.[4] Such cases should be governed, without further analysis, by this Court's unexceptioned incident to service rule. That categorical rule is proper, because it pertains to the "*type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer,* 473 U.S. at 59).[5]

b. This is so, moreover, as we showed in our opening brief, whether or not the plaintiff has sued the United States alleging negligence on the part of civilian employees only. Such cases will often involve possible negligence by civilian or military employees of the United States in the formulation and implementation of a particular military exercise or action. As the role that the FAA performs in assisting the military illustrates (see our opening brief at

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[4] Amicus Gilardy states (Br. 8, 22) that the military rescue mission had been terminated at the time Lieutenant Commander Johnson's heliocopter crashed, so that "the FAA air traffic controllers were not called upon to assist in a dangerous military operation" (Br. 10). That is absurd. It is undisputed that Lieutenant Commander Johnson and his crew responded to a distress call from a boat lost in a storm and that, during the rescue mission, because of deteriorating weather conditions, they requested assistance from Federal Aviation Administration (FAA) air traffic controllers (see Resp. Br. 3).

Amicus Gilardy argues that the accident did not occur as part of a military operation, because at the time of the accident Lieutenant Commander Johnson planned to land, refuel, and wait for daybreak (Br. 8). Whether Lieutenant Commander Johnson was planning to refuel or whether he was planning to search for the boat without refueling, the accident occurred during the course of the rescue operation.

[5] Respondent and amicus Gilardy contend that because this case was dismissed by the district court (Pet. App. 35a) on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) the allegations in the complaint are taken to be true. This is of course correct. It does not follow, however, that the application of *Feres* depends on a probing evaluation of the facts as alleged by the plaintiff.

14-17), the conduct of a military mission may sometimes be questioned just as effectively by challenging civilian actions as by challenging the actions of service members.[6] In addition, even where the alleged civilian tortfeasor does not regularly work with the military, defense of the case may not be possible without focusing on questions of military fault in the formulation or execution of a military action. Since it may be that military personnel rather than civilians were primarily responsible for the harm, the United States might need to prove unactionable military negligence in order to defend the case. So too, it might be necessary to prove contributory negligence on the part of the injured service member.

Respondent nevertheless contends (Br. 26) that cases such as this one should go forward subject to dismissal at some undisclosed time if military decisions are in fact called into issue. Much of the harm to military discipline and effectiveness, however, is likely to be sustained as a result of the inquiry into the facts of the case, so that much

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[6] *Newell* v. *Maritime Administration*, petition for cert. pending, No. 86-1002, underscores this point. In *Newell*, a service member was injured while participating in a Navy reserve training exercise. The ship on which the training exercise was conducted is part of the Nation's Ready Reserve Force, a fleet of ships acquired and maintained through the joint efforts of the Navy and the Maritime Administration, a civilian agency of the federal government. The service member sued for damages, carefully avoiding any direct claim of Navy negligence, but instead alleging that the Maritime Administration was negligent in maintaining the ship. The district court dismissed on the basis of *Feres* and the Third Circuit affirmed, holding that "the rule in *Feres* cannot be artificially limited to cover only military personnel, but * * * must also include those civilians who are necessarily involved in activities incident to military service." 86-1002 Pet. App. 20a-21a. But if respondent's views were accepted, it is clear that a multitude of military decisions—like those made daily by FAA controllers or personnel in the Maritime Administration—would be subject to judicial scrutiny.

of the harm the *Feres* doctrine aims to prevent would occur as a result of the case-by-case inquiry itself. For example, it is common in cases such as this that there will be a real question whether pilot error or errors on the part of other Coast Guard members were the cause of the crash. The process of attacking the deceased pilot's actions or the actions of other Coast Guard members in court would have a deleterious effect on military discipline and effectiveness.[7]

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[7] Respondent states that whether or not suits based on injuries incurred incident to service will generally call military decisions into question, a Coast Guard report that is not part of the record shows that there is no doubt that air traffic controller negligence, rather than Coast Guard errors, caused the crash at issue (Br. 26-27 & n.9). We submit that such an assertion is completely irrelevant, both because it rests on facts outside the record, and because the specific facts of an injury clearly incurred incident to service do not affect the applicability of *Feres*.

Lest the Court misunderstand our silence, however, we must also take issue with respondent's characterization of the report. Far from placing the blame for the accident squarely on the air traffic controller, the report suggested that a number of factors led to the crash, including the crew's inattention and its failure to obtain a weather report before taking off. It stated that the fatigue of the crew members (who had been on duty for 22 hours, during which they had slept for about 2-1/2 hours) was probably a factor causing them not to keep properly alert and questioned whether, in light of the hazardous weather conditions and the fatigue of the crew, a different crew should have been sent on the mission. It also stated that fatigue on the part of the air traffic controller could have been a factor in causing the crash.

The report also suggested that the Coast Guard equip helicopters like the one used in the mission with radar, since that would have prevented the crash at issue, and concluded that the radar used by the air traffic controller did not permit the controller to determine accurately how far the helicopter was from the island where it crashed. In short, contrary to respondent's statements, the report suggested a number of ways in which Coast Guard personnel, including the crew, may have been responsible for the crash.

More broadly, the allowance of suit for actions occurring incident to duty would be at odds with the special type of service rendered by the nation's military—marked by emphasis on duty to country, obedience to superior authority, and acceptance of injury or even death. This special type of service is a badge of honor and distinction for which our military pesonnel are rightly celebrated in life and death, and recognized with special kinds of benefits. It requires a commitment to perform the appointed mission notwithstanding risks far beyond those typical of everyday life—risks that in some circumstances may be overwhelming. See *McKay* v. *Rockwell International Corp.*, 704 F.2d 444, 453 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984). Such traits of character and mind as the military demands do not cohabit easily with a tort system that dwells on a service member's rights against those who cause him harm. A set of rules which starts with the premise that the availability of judicial relief is the rule rather than the exception tends itself to undercut military discipline and effectiveness by deemphasizing and minimizing the extraordinary commitment that is required. Thus, the *Feres* bar to suit for injuries incurred incident to military service is a recognition not only of the possible harmful effects of specific litigation, but also that the military mission in general demands a unique form of dedication and selflessness from those who carry it out.

2. We also contended in our opening brief (at 22-27) that veterans' benefits are the exclusive remedy for service members injured incident to military service, as this Court has repeatedly stated. *Hatzlatchh Supply Co.* v. *United States,* 444 U.S. 460, 464 (1980); *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666, 673 (1977). Respondent contends (Br. 27-30) that we have failed to recognize that this Court authorized receipt of both veterans' benefits and tort recoveries in *Brooks* v. *United States,* 337 U.S. 49 (1949), and *United States* v. *Brown,* 348 U.S. 110

(1954). In fact, we explicitly recognized (Br. 23 n.11) that the receipt of veterans' benefits does not itself bar a tort action against the government. However, since *Feres,* it is clear that veterans' benefits are the exclusive remedy *for injuries incurred incident to military service.*[8]

Respondent also notes (Br. 10), as we did (Br. 8 & n.2), that Congress has considered amending the Federal Tort Claims Act (FTCA) on a number of occasions to authorize service members to pursue FTCA claims in some cases where injuries were incurred incident to military service. It has been clear since this Court's decisions in *Brooks* and *Feres,* which were issued shortly after the enactment of the FTCA, that veterans' benefits are the exclusive remedy for injuries incurred incident to service, and Congress is clearly aware of that rule. The Court noted in *Feres* that if it had misunderstood Congress's intention, "Congress possesses a ready remedy" (340 U.S. at 138). If subsequent congressional intention is ever to be relevant to the ascertainment of the meaning of a previously enacted statute, the extended period of congressional inaction here[9] suggests that any

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[8] We also noted in our opening brief that, as the Court stated in *Feres* (340 U.S. at 143), it "would hardly be a rational plan" to have a service member's right to pursue a tort action depend on the laws of the fifty states. Respondent focuses on the air traffic controller whose negligence allegedly caused the crash, and contends (Br. 31) that it is not anomalous to have his actions governed by the laws of Hawaii. However, this Court in *Feres* focused on the injured service member, not on the alleged tortfeasor, in concluding that Congress did not intend to permit service members injured incident to military service to pursue tort actions against the United States in which their rights would vary depending on the state in which the injury occurred.

[9] The recent proposed amendments to the FTCA that were not enacted involved proposed waivers of sovereign immunity so that service members could bring medical malpractice suits. See H.R. 1161, 99th Cong., 1st Sess. (1985); H.R. 1942, 98th Cong., 1st Sess. (1983).

departure from the settled rule that veterans' benefits are the exclusive remedy for injuries incurred incident to service ought to come from Congress. See *Flood* v. *Kuhn*, 407 U.S. 258, 283-284 (1972).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40215